

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA
Held at 800 West Washington Street
Conference Room 308
Phoenix, Arizona 85007
Wednesday, July 22, 2015 – 1:00 p.m.

Present:	Dale L. Schultz	Chairman
	David M. Parker	Commissioner (video)
	Michael G. Sanders	Commissioner
	Joseph M. Hennelly, Jr.	Commissioner
	Clint Bolick	Commissioner
	Laura McGrory	Director
	Andrew Wade	Chief Counsel
	William Warren	ADOSH Director
	Valli Goss	Assistant Chief Counsel
	Steven Ripple	Compliance Officer
	Bryan Williams	Compliance Officer
	Yvonne Borunda	Acting Commission Secretary

Chairman Schultz convened the Commission meeting at 1:00 p.m. noting a quorum present. Also in attendance were Jason Weber of Snell & Wilmer, Stephanie Coulter of The Cavanaugh Law Firm and Kirstin Story representing the Arizona Secretary of State.

Approval of Minutes of July 9, 2015 Regular Session Minutes and July 1, 2015 Executive Session Minutes.

The Commission unanimously approved the July 9, 2015 regular session minutes on motion of Commissioner Sanders, second of Commission Hennelly.

Commissioner Sanders commented that he wanted to discuss the draft July 1, 2015 executive session minutes. Chairman Schultz announced that consideration of the draft executive session minutes would be moved to the end of the meeting agenda.

Consent Agenda:

All items following under this agenda item are consent matters and will be considered by a single motion with no discussion unless a Commissioner asks to remove an item on the consent agenda to be discussed and voted on separately. The Commission may move into Executive Session under A.R.S. § 38-431.03(A)(2) to discuss records exempt by law from public inspection. Legal action involving a final vote or decision shall not be taken in Executive Session. If such action is required, then it will be taken in General Session.

a. Approval of Proposed Civil Penalties Against Uninsured Employers.

1. 2C14/15-0145 FXRS, Inc., dba First Heritage Restoration
2. 2C14/15-0717 Get Smart Delivery LLC
3. 2C14/15-0545 Intense Remodel LLC
4. 2C14/15-0934 Mens Lounge Barbershop, LLC

5. 2C14/15-2376 Specialneedsvehicles, Inc., dba Adapt Mobility

Chairman Schultz asked if any agenda items needed to be removed from the Consent Agenda. Hearing none, the Commission unanimously approved the items on the Consent Agenda on motion of Commissioner Bolick, second of Commissioner Sanders.

Discussion and Action Regarding Requests to the Governor's Office for Approval Under Executive Order 2015-01 to Proceed with Rulemaking.

Laura McGrory advised that there is one request pending related to confined spaces in construction.

Discussion and Action of Arizona Division of Occupational Safety and Health (ADOSH) Discrimination Complaint.

14-2919-05 - Mark A. Lopez vs. City of Winslow, Winslow Fire Department

William Warren presented a summary of additional pretext analysis that was performed after the Commission's prior consideration and action of this matter, and he referred to the amended report prepared by staff. Mr. Warren presented staff's amended recommendation. Commissioner Sanders commented on staff's analysis, claimant's workers' compensation claim, and whether the filing of a workers' compensation claim is protected activity. Mr. Warren noted that the claim was accepted.

Andrew Wade commented on the availability of an executive session if the Commission wanted to discuss the strengths and weaknesses of the facts, the wisdom of pursuing the case, or to obtain legal advice.

Chairman Shultz asked if the Commission desired an executive session. Commissioner Parker moved the Commission enter into executive session to discuss contemplated litigation and to obtain legal advice. Commissioner Hennelly seconded the motion.

Commissioner Bolick suggested hearing any public comment on this matter before moving into executive session. There were no public comments. The Commission unanimously voted to move into executive session. Executive session minutes are kept separately.

The Commission returned to regular session at 1:50 p.m.

Chairman Schultz asked if there was further discussion or a motion. Commissioner Parker moved to reconsider or to accept the amended report. Commissioner Sanders requested clarification on the procedural posture of the matter. Chairman Schultz commented on the procedural posture. Commissioner Bolick suggested the Commission ratify the Commission's prior decision to pursue in light of the additional analysis and amended report. Following discussion, Commissioner Parker withdrew his motion and Commissioner Bolick moved to ratify the Commission's prior decision to pursue this matter in light of the amended report. Commissioner Parker seconded the motion. Mr. Wade asked if the motion included directing Commission staff to file a lawsuit and pursue other actions as necessary to pursue this matter in court. Commissioner Bolick added that his motion did include the direction to staff.

Chairman Schultz asked if there was any further discussion. There was no further discussion and Chairman Schultz called for a vote. Chairman Schultz, Commissioner Parker, Commissioner Hennelly, and Commissioner Bolick voted in favor of the motion. Commissioner Sanders voted against the motion.

14-2865-02 - Complainant Request for Reconsideration

Steven Faer vs. State of Arizona, Secretary of State – Mr. Warren explained that this matter was previously presented to the Commission, the Commission decided not to pursue the matter, and Mr. Faer had requested the Commission reconsider that decision. Mr. Warren summarized Mr. Faer's request, the original investigation, and the further review performed as a result of Mr. Faer's request for reconsideration.

Chairman Schultz asked if there were any questions for Mr. Warren. Commissioner Bolick asked Mr. Warren if ignoring the Commission's prior vote, would staff's recommendation remain the same today, which was to pursue. Mr. Warren responded that his recommendation remains to pursue.

Chairman Schultz acknowledged a request to speak from Assistant Attorney General Kirstin Story and asked if she would like to address the Commission. Ms. Story introduced herself and offered to answer any questions the Commission may have. Otherwise, she did not have any comment. Chairman Schultz asked if there was a motion. Commissioner Sanders moved to ratify the prior decision not to pursue. Commissioner Hennelly seconded the motion. Chairman Schultz asked if there was any further discussion.

Mr. Wade explained that it is important that the Commission consider Mr. Faer's request for reconsideration even though a motion to ratify the prior decision would not change the outcome.

Mr. Bolick explained his view that this is a very strong case of retaliation and that the original recommendation to pursue was the correct one. He summarized some pertinent facts and commented on the reorganization being used as a pretext to retaliate against Mr. Faer. Commissioner Bolick commented on the reconsideration process and questioned whether there was an opportunity to reconsider the Commission's prior decision if additional or new evidence was not presented by Mr. Faer in his request for reconsideration. Mr. Wade and Ms. McGrory responded noting that the Commission may reconsider its prior decision not to pursue this case. Commissioner Parker summarized the reconsideration process. Commissioner Hennelly commented that he has never felt constrained by any requirement that the complainant present new information before the Commission considers a request for reconsideration. Commissioner Sanders agreed.

Chairman Schultz asked if there was further discussion. Commissioner Sanders commented on exhibit 3 and stated that he would like to hear what Commissioner Bolick has to say. Chairman Schultz noted that there was a motion and a second. Commissioner Sanders withdrew his motion.

Commissioner Bolick commented on Mr. Faer's job duties, exhibit 3, and pages 13 and 14 of the amended report. He described his view of the evidence. Commissioner Bolick asked Mr. Warren about exhibit 3. Mr. Warren and Mr. Ripple responded to the question. Commissioner

Sanders referred to exhibit 3 and commented on the reassignment of duties. Mr. Ripple commented on Mr. Faer's job duties.

Ms. Story requested to speak. Ms. Story summarized the timeline of the job duties, reassignment and the reorganization. She noted an e-mail that was copied to Mr. Faer, as well as attachment 5, and she described her client's view of what those communications established. Chairman Schultz asked Ms. Story about the job duties, and noted the exceeds expectations evaluation that was received by Mr. Faer, which included the risk management job duties. Ms. Story responded that performance evaluations were on an annual basis and the performance evaluation included the six months that Mr. Faer had the risk management duties. Chairman Schultz asked if there was any direct communication from the supervisor to Mr. Faer to cease and desist the job duties. Ms. Story responded to the question. Commissioner Bolick asked about records relating to placing Mr. Faer into an entry level position as part of the reorganization. Ms. Story responded that Mr. Faer maintained his position but responsibilities were reassigned.

Chairman Schultz noted that there were no personnel transition forms or changes in Mr. Faer's job description and that it seemed that Mr. Faer was just reassigned to clerical duties. Ms. Story responded that Mr. Faer maintained his position. There was no demotion, and it was just that the risk management duties were centralized to another person.

Commissioner Bolick asked if ADOSH had any comments to make. Mr. Warren explained that Mr. Faer's position was a safety coordinator position, which included both risk management and safety responsibilities. Mr. Warren and Mr. Ripple commented on the reorganization and the impact on Mr. Faer's safety inspection duties. Commissioner Bolick commented on the difficulty in terminating an employee in a government position. He explained the significance of Mr. Faer being placed in an entry level position in terms of a pretext analysis. Commissioner Parker summarized the duties of a risk management position and commented on the reorganization. He noted the presence of budget cuts. Commissioner Sanders commented on the reassignment of job duties. Ms. Story responded that the risk management coordination duties were reassigned and consolidated to Eric Blum.

Chairman Schultz asked if there were any more questions or discussion. Commissioner Bolick moved to reconsider the Commission's prior decision not to pursue, and to pursue this matter. No-one seconded the motion.

Commissioner Sanders moved that the Commission take no further action. Commissioner Parker seconded the motion. Chairman Schultz, Commissioner Parker, Commissioner Sanders and Commissioner Hennelly voted in favor of the motion. Commissioner Bolick voted against the motion.

Discussion and Action of Arizona Division of Occupational Safety and Health Proposed Citations and Penalties.

B/H Drywall & Stucco Co. Inc.
1380 N. Eliseo C. Felix Jr. Way
Avondale, AZ 85323

Planned
Years in Business: 42
Empl. Covered by inspection: 4

Site Location: 14851 W Surrey Dr
Surprise, AZ 85379
Inspection No: H9685-1061356
Inspection Date: 05/5/2015

SERIOUS – Citation 1 - Item 1 –

- a) East side of House: The space between the planks on the second tier of the tubular welded frame scaffold was 2 inches in width. (29 CFR 1926.451(b)(1)(i)).
- b) East side of House: An employee used the crossbraces on the tubular welded to descend to the ground level. (29 CFR 1926.451(e)(1)).
- c) North Side of House: Direct access to the roof from the tubular welded frame scaffold was used by two employees when the scaffold was more than 4 foot 4 inches vertically from the roof eave surface. (29 CFR 1926.451(e)(8)).
- d) A two tiered tubular welded frame scaffold was not inspected for visible defects by a competent person before each work shift. (29 CFR 1926.451(f)(3)).
- e) East Side of House: The toeboard on the second tier of the tubular welded frame scaffold exceeded 1/4 inch above the scaffold planks. (29 CFR 1926.451(h)(4)(ii)).
Div. Proposal - \$1,750.00 Formula Amt. - \$1,750.00

SERIOUS – Citation 1 - Item 2 – The employer did not have three employees who performed work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. (29 CFR 1926.454(a)).

Div. Proposal - \$1,750.00 Formula Amt. - \$1,750.00

SERIOUS – Citation 1 - Item 3 – East Side of Home: Three employees applying stucco finish were exposed to a fall over 10 feet above a lower level and were not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest system. (29 CFR 1926.501(b)(13)).

Div. Proposal - \$1,750.00 Formula Amt. - \$1,750.00

SERIOUS – Citation 1 - Item 4 – East Side of House: Three employees, who were exposed to a fall over 10 feet above a lower level while applying stucco finish, were not provided a training program to enable each employee to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards. (29 CFR 1926.503(a)(1)).

Div. Proposal - \$1,750.00 Formula Amt. - \$1,750.00
TOTAL PENALTY - \$7,000.00 TOTAL FORMULA AMT. - \$7,000.00

Mr. Warren summarized the citations and proposed penalty as listed. Commissioner Bolick referred to Citation 1 Item 1 and asked about the serious classification on a cumulative or individual basis. Mr. Warren responded to the question. Commissioner Bolick asked for a description of the hazard in Citation 1 Item 1(a). Mr. Warren responded to the question. Chairman Schultz and Commissioner Parker noted that they had a similar question and their question had been answered. Following discussion, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$7,000.00 on motion of Commissioner Parker, second of Commissioner Hennelly.

F.V. Apts, L.L.C.
1254 Niels Hansen Ln
Lakeside, AZ 85929

Site Location: 1264 Niels Hansen Ln
Lakeside, AZ 85929
Inspection No: V1001-1050302
Inspection Date: 3/31/2015

Complaint
Years in Business: 1
Empl. Covered by inspection: 2

SERIOUS – Citation 1 - Item 1 – East side second story roof: Two employees were working at a height of approximately 18 feet and were not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems. (29 CFR 1926.501(b)(10)).

Div. Proposal - \$750.00 Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 2 – Balcony East side: Two employees were on a second floor balcony approximately 10 feet above the lower level and were not protected by guardrail systems, safety net system, or personal fall arrest system. (29 CFR 1926.501(b)(13)).

Div. Proposal - \$750.00 Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 3 – Balcony East side: The employer did not train employees to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards. (29 CFR 1926.503(a)(1)).

Div. Proposal - \$750.00 Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 4 –

a) Second floor balcony: Two employees were utilizing an 8 foot Werner fiberglass stepladder, model and serial number unknown, as a means of access and egress to the second story roof deck from the patio on the second floor, which was approximately 10 feet from the ground level. The second story roof height was approximately 18 feet.

(29 CFR 1926.1053(b)(4)).

b) An employee was observed utilizing an 8 foot portable stepladder and the employer did not provide ladder training in the recognition and avoidance of unsafe conditions associated with the use of portable ladders. (29 CFR 1926.1060(a)).

Div. Proposal - \$750.00 Formula Amt. - \$750.00

TOTAL PENALTY - \$3,000.00

TOTAL FORMULA AMT. - \$3,000.00

Mr. Warren summarized the citations and proposed penalty as listed. Commissioner Parker noted that Citation 1 Items 1 and 2 are both 29 CFR 1926.501(b) with different subsections and asked why the two violations are not grouped. Mr. Warren explained why they were not grouped. Commissioner Hennelly asked whether the exposed workers were employees of F.V. Apts, L.L.C. Mr. Warren and Mr. Williams respond to the question. Following discussion, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$3,000.00 on motion of Commissioner Bolick, second of Commissioner Sanders.

Holderness Building Materials, Inc.
dba Holderness Supplies
450 E. Irvington Road
Tucson, AZ 85714

Planned
Years in Business: 80
Empl. Covered by inspection: 31

Site Location: 450 E. Irvington Road
 Tucson, AZ 85714
 Inspection No: T3633-1064126
 Inspection Date: 05/18/2015

SERIOUS – Citation 1 - Item 1 – 450 E. Irvington Road, Tucson: Employees did maintenance work on machines, including changing blades on the Alpine brand component saws, and the employer had not established lockout/tagout procedures and trained employees to ensure that the equipment would be isolated and rendered inoperative prior to any work where the unexpected energizing or start up could occur and cause injury. (29 CFR 1910.147(c)(1)).

Div. Proposal - \$1,250.00 Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 2 –

a) East of the truss fabrication tables: A Hyster brand forklift, model 50, serial number H177B40709A, did not have the emergency brake adjusted so that it would prevent the forklift from moving, and the horn did not work. (29 CFR 1910.178(p)(1)).

b) 450 E. Irvington Road, Tucson: Industrial trucks (forklifts) used to move wood and wood products did not have adequate daily examinations prior to being put into service. (29 CFR 1910.178(q)(7)).

Div. Proposal - \$1,250.00 Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 3 – East truss table: The Mitek Industries brand roller, unknown model and serial number did not stop its movement in either direction when the emergency stop bars were pushed. (29 CFR 1910.212(a)(1)).

Div. Proposal - \$1,250.00 Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 4 – Mill area: Employees used a Dario brand band saw, Matr. #0407382, to cut corbels, and the unused portion of the blade between the guide wheels and the upper wheel guard was not guarded. (29 CFR 1910.213(i)(1)).

Div. Proposal - \$1,250.00 Formula Amt. - \$1,250.00

TOTAL PENALTY - \$5,000.00 TOTAL FORMULA AMT. - \$5,000.00

Mr. Warren summarized the citations and proposed penalty as listed. Commissioner Bolick asked Mr. Warren to describe the other two instances under Citation 1 item 3. Mr. Warren responded to the question. Following discussion, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$5,000.00 on motion of Commissioner Sanders, second of Commissioner Bolick.

Klein's Kosher Pickle Company
 4125 W Whitton Ave
 Phoenix, AZ 85019

Complaint
 Years in Business: 33
 Empl. Covered by inspection: 51

Site Location: 4125 W Whitton Ave
 Phoenix, AZ 85019
 Inspection No: U5916-1063389
 Inspection Date: 05/15/2015

SERIOUS – Citation 1 - Item 1 – Tank yard: An open-sided platform approximately 12 feet 3 inches wide and approximately 4 feet 9 inches above ground was not protected by standard railings or an equivalent means to prevent a fall to the ground below. (29 CFR 1910.23(c)(1)).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

SERIOUS – Citation 1 - Item 2 –

a) Warehouse: One Clark forklift, model and serial number unknown had a nameplate that was not legible. (29 CFR 1910.178(a)(6)).

b) Warehouse Area: One Clark forklift, model and serial numbers unknown, was not taken out of service for the unsafe conditions of a non-operational horn. (29 CFR 1910.178(p)(1)).

c) Warehouse/Production Areas: One Clark forklift number 10, model and serial number unknown was not examined prior to daily use. (29 CFR 1910.178(q)(7)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 3 –

a) Warehouse/Production/Tank yard: Three employees operating powered industrial trucks, models and serial numbers unknown, were not trained in the safe operation of forklifts. (29 CFR 1910.178(l)(1)(i)).

b) Production/Tank yard: The employer did not conduct performance evaluation of two fork lift operator's at least once every three years. (29 CFR 1910.178(l)(4)(iii)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 4 – Tank Yard: A single phase 220V Hubbell Twist Lock electrical receptacle installed between Tank N7 and N8 was missing a face plate or cover. (29 CFR 1910.305(b)(2)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

TOTAL PENALTY - \$4,750.00

TOTAL FORMULA AMT. - \$4,750.00

Mr. Warren summarized the citations and proposed penalty as listed. Commissioner Sanders asked for more details concerning whether all or only some forklifts were not in compliance and for an explanation of the hazards resulting from an illegible nameplate. Mr. Warren responded to the question. Chairman Schultz commented on forklift operator training and the data from a nameplate. Commission Bolick asked Mr. Warren to explain the serious classification for Citation 1 Item 1. Mr. Warren responded to the question. Following discussion, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$4,750.00 on motion of Commissioner Parker, second of Commissioner Hennelly.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

There were no announcements or other discussion under this item.

Public Comment.

There was no public comment.

Approval of July 1, 2015 Executive Session Minutes.

Commissioner Sanders moved the Commission enter into executive session to discuss the draft July 1, 2015 executive session minutes. Commissioner Hennelly seconded the motion and the Commission unanimously voted to move into executive session. Executive session minutes are kept separately.

The Commission returned to regular session at 3:06 p.m.

Commissioner Sanders moved to approve the minutes of the executive session with the amendment discussed in executive session. Commissioner Parker seconded the motion. The Commission unanimously approved the minutes of the July 1, 2015 executive session minutes with the amendment discussed in executive session.

Chairman Schultz asked if there was a motion to adjourn. Commissioner Sanders moved to adjourn and Commissioner Bolick seconded the motion. The Commission unanimously voted to adjourn and the meeting was adjourned at 3:07 p.m.

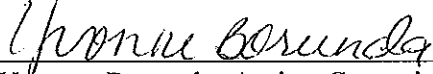
THE INDUSTRIAL COMMISSION OF ARIZONA

By



Laura McGrory, Director

ATTEST:



Yvonne Borunda, Acting Commission Secretary